

Financial Ombudsman Service holds Carey liable for breach of regulatory obligations in further SIPP investor complaint (*S v Options SIPP UK LLP*)

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Pensions analysis: In a further set-back for the execution-only SIPP industry, Carey Pensions (Carey, now known as Options UK Personal Pensions), an authorised, execution-only self-invested personal pension (SIPP) provider, has been held liable by the Financial Ombudsman Service (FOS) in another investor complaint arising out of losses suffered on a high-risk investment following an introduction from an unauthorised broker, again shining a spotlight on the respective approaches of the courts and the FOS when considering the obligations of such SIPP providers to their clients. Written by Henry Day, barrister at Radcliffe Chambers.

S v Options SIPP UK LLP (formerly Carey Pensions UK LLP) [Ref DRN5472159, 26 February 2021](#)

See also Henry Day's analysis of:

- *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [\[2020\] EWHC 1229 \(Ch\)](#), [\[2020\] All ER \(D\) 136 \(May\)](#): [Landmark investment loss claim against SIPP provider dismissed \(Adams v Options SIPP UK LLP\)](#)
- *T v Carey Pensions UK LLP* [Ref DRN207642: Financial Ombudsman Service at odds with High Court in second Carey SIPP case \(T v Carey Pensions UK LLP\)](#)
- *Adams v Options UK Personal Pensions LLP (formerly Options SIPP UK LLP and Carey Pensions UK LLP) and The Financial Conduct Authority* [\[2021\] EWCA Civ 474: Court of Appeal holds SIPP contract unenforceable under FSMA 2000, s 27 \(Adams v Options UK Personal Pensions LLP\)](#)

What are the practical implications of this case?

The FOS reached its [decision](#) in this complaint after the first instance decision (*Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [\[2020\] EWHC 1229 \(Ch\)](#), [\[2020\] All ER \(D\) 136](#)) but before the Court of Appeal judgment (*Adams v Options UK Pensions LLP (formerly Options SIPP UK LLP and Carey Pensions UK LLP)* [\[2021\] EWCA Civ 474](#)) in the case brought against Carey by Russell Adams, another disgruntled investor.

Although, like the Court of Appeal, the FOS found against Carey, the complaint here did not concern [section 27](#) of the Financial Services and Markets Act 2000 ([FSMA 2000](#)) (the ground on which Mr Adams' appeal was allowed).

Instead, the issue before the FOS was whether Carey had paid due regard to the client's interests and treated him fairly. In this, the complaint reflected the main alternative limb of the claimant's case in *Adams*, concerning Rule 2.1.1R of the Conduct of Business Sourcebook Rules (COBS) in the FCA Handbook (the client's best interests rule), which the High Court dismissed (as did the Court of Appeal, albeit on the ground that Mr Adams' case on this point on appeal differed from his case at trial).

The FOS's [decision](#) seeks, however, to distinguish the High Court's judgment in *Adams* by avoiding reference to COBS 2.1.1R and focusing instead on the FCA Handbook's Principles for Businesses (which cannot ground a claim at law: see, eg, *Kerrigan v Elevate Credit International Ltd* [\[2020\] GCCR 18155](#) at para [30]), in particular on the question of due diligence (Carey's obligations in this regard having primacy, in the FOS's view, over the execution-only nature of its contract with the complainant).

It might be argued that this approach looks at the issue from the wrong end—the principles fall to be applied within the context of the specific duties imposed by the FCA Handbook's Rules and the contractual arrangements between the relevant parties, not the other way around.

There is perhaps also some tension between the FOS's acknowledgement that, in accordance with its regulatory permissions, Carey had no obligation to ensure the suitability of a pension product or investment for the complainant and its conclusion that Carey should nonetheless have refused to accept the complainant's business because the investment was unsuitable.

At root, however, the difference between the High Court's decision in *Adams* and that of the FOS in this case (reflecting the FOS's decisions in other similar recent complaints, eg, *T v Carey Pensions UK LLP* [Ref DRN207642](#); see also *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Ltd* [\[2018\] EWHC 2878 \(Admin\)](#)), may perhaps best be regarded as a function of the respective tribunals' different jurisdictions and approaches. Under [FSMA 2000, s 228\(2\)](#) the FOS is required to decide complaints according to what it considers 'fair and reasonable' in all the circumstances, a broad criterion which has in the past received adverse judicial comment (see, eg, *R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [\[2017\] EWHC 352 \(Admin\)](#), [2017] Lloyd's Rep IR 404 per Jay J at para [73]) and which allows the FOS to go beyond the strict position at law—as reflected, for example, in the weight typically accorded by the FOS to the FCA's published statements on the duties of SIPP providers (which, as the High Court emphasised in *Adams* at para [162], cannot found a claim for compensation or properly assist in the construction of the FCA Handbook's Rules).

That said, it is worth noting the Court of Appeal's observations in *Adams* at para [115] about the importance of 'consumer protection' as a 'key aim' of [FSMA 2000](#) (albeit in the context of [FSMA 2000, s 28](#)), which aim the Court of Appeal appears to have regarded as of greater importance than the general principle set out in [FSMA 2000, s 1C\(2\)\(d\)](#) that 'consumers should take responsibility for their decisions'. Although, therefore, as matters currently stand, the legal position on the client's best interests rule is as set out in the High Court's decision in *Adams*, query whether this will withstand further judicial scrutiny and, hence, whether the position at law will in due course become more closely aligned with the FOS's view.

In the meantime, regardless of the position at law, practitioners representing execution-only SIPP providers (and indeed other financial services firms which operate on this basis) will need to remain alert to the FOS's investor-friendly approach to complaints of this nature and accordingly to ensure their clients exercise extreme caution when dealing with introducers (especially if unregulated) and potentially esoteric investment products.

What was the background?

In 2012 the complainant, on the recommendation of an unauthorised broker called Commercial Land and Property (CLP), transferred funds amounting to approximately £42,000 from his personal pension into a SIPP with Carey and then invested the majority those funds in storage unit rentals with a company called Store First. Following that investment, the complainant received a cash back payment from CLP of £2,000. The investment subsequently failed to perform as expected and the complainant complained to the FOS (via a claims management company), alleging in summary that Carey had failed to carry out due diligence on CLP, and to organise its affairs responsibly, in accordance with the FCA Handbook's Principles and Rules and seeking compensation for the loss on his investment.

What did the court decide?

Notwithstanding the express terms of the complainant's contract with Carey (which made clear that Carey was acting on an execution-only basis and that the investment was the complainant's responsibility), the FOS upheld the complaint.

Having regard to Principles 2 ('Skill, care and diligence'), 3 ('Management and control') and 6 ('Customer's interests'), and the FCA's published expectations of SIPP operators (in particular, its 2009 and 2012 thematic reviews, its 2013 finalised SIPP operator guidance and its 2014 Dear CEO letter), and applying the criterion of 'fairness' per [FSMA 2000, s 228\(2\)](#), the FOS found that:

- although Carey had made some efforts towards satisfying the FCA's expectations, it had failed to conduct sufficient due diligence on both CLP and Store First and to treat the complainant fairly
- had Carey conducted sufficient due diligence and treated the complainant fairly, it should and would have concluded that it would not have been fair and reasonable, or in the complainant's best interests, to accept the complainant's business from CLP and to carry out the investment in Store First, or at least that it should have informed the complainant of what it did know about CLP and Store First and allowed him to decide whether to proceed, and
- in the circumstances, Carey had failed to meet its regulatory obligations

In reaching these conclusions, the FOS found that:

- as regards CLP, Carey had (inter alia) failed before accepting the complainant's business to carry out checks on CLP's two directors, to consult the FCA's list of and warnings about unauthorised firms and individuals (in which one of CLP's directors was mentioned), to take action in response to its discovery that a number of its clients had received cash incentives, and to check CLP's accounts, and had proceeded with the complainant's application after it had terminated its relationship with CLP, and
- as regards Store First, Carey had failed to carry out adequate company searches (which, the FOS said, should have revealed that one of its directors was the subject of intended

legal action arising out of a failed property investment), to consider the indications in the company's marketing materials that prospective investors were being misled (in particular, statements as to high guaranteed returns and investment liquidity, and an absence of risk warnings), and to act upon its discovery (pre-dating the complainant's investment) that Store First was paying high levels of commission to CLP, and had proceeded with the complainant's investment despite previously having temporarily suspended investments in Store First

Following its finding that Carey should not have accepted the complainant's business from CLP or the investment in Store First, or at least should have informed the complainant of what it knew about both companies, the FOS went on to hold that, had Carey acted as it should have, the complainant would not have transferred his pension or invested with Store First and his losses would have been avoided, and that Carey was accordingly liable for those losses in full.

The FOS therefore ordered Carey to make compensation by taking ownership of the complainant's Store First investment (if possible), paying into his SIPP (or to the complainant directly) a sum equal to the loss suffered as result of the pension transfer (taking into account tax relief, charges and interest) and paying an additional £500 for distress suffered.

Carey has sought permission in *Adams* to appeal to the Supreme Court.

Case details:

- Court: Financial Ombudsman Service
- Judge: John Pattinson
- Date of judgment: 26 February 2021

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